

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL JOSEPH PITKIN,

Case No.: 3:20-cv-00340-MMD-WGC

Plaintiff

Report & Recommendation of United States Magistrate Judge

V.

Re: ECF Nos. 1, 1-1

CHARLES G. KRASNER, M.D., et. al.,

Defendants

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1).

I. IFP APPLICATION

15 A person may be granted permission to proceed IFP if the person “submits an affidavit
16 that includes a statement of all assets such [person] possesses [and] that the person is unable to
17 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
18 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez*
19 *v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to
20 all actions filed IFP, not just prisoner actions).

21 The Local Rules of Practice for the District of Nevada provide: "Any person who is
22 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].

1 The application must be made on the form provided by the court and must include a financial
 2 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
 4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the
 6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
 8 therefore, the application should be granted.

9 II. SCREENING

10 A. Standard

11 "[T]he court shall dismiss the case at any time if the court determines that-- (A) the
 12 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
 13 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a
 14 defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
 17 tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the
 18 court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668
 19 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a plaintiff has failed to
 20 state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the
 21 Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim."). Review under
 22 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,
 23 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
3 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
4 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
5 (1980) (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
7 action," it must contain factual allegations sufficient to "raise a right to relief above the
8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
9 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
10 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
11 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
12 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff's complaint names as defendants Charles G. Krasner, M.D., Ed Heidig (Health
19 and Human Services (HHS) Regional Director, Region IX), and Julia Peek, MHA, CPM (Deputy
20 Administrator of Nevada Department of Health and Human Services, Division of Public and
21 Behavioral Health).

22 Plaintiff alleges that he was denied HIV care under the Ryan White CARE Act and the
23 Affordable Care Act. He asserts that while living in Reno for four years he has been discharged

1 from all HIV specialty care twice due to some allegations of his lying with respect to lab work,
2 and then a healthcare provider not believing his claims of side effects. He further states that the
3 Health Plan of Nevada refused to work to transition his HIV specialty care to Las Vegas.

4 Plaintiff further alleges discrimination based on his status as a white, 55-year old
5 homosexual, HIV positive, theistic satanic male from his family, HIV care providers, and his
6 community representatives.

7 Currently, Plaintiff does not state a claim upon which relief may be granted. The Ryan
8 White Comprehensive AIDS Resources Emergency Act (CARE Act) is a federal program
9 designed to provide care and treatment to people with HIV/AIDS by funding grants to cities,
10 states, counties, and local community-based organizations for low income people with
11 HIV/AIDS. *See* 42 U.S.C. 300ff, *et. seq.* It does not appear to provide a private right of action. It
12 is unclear whether Plaintiff is attempting to assert a claim under the CARE Act, or whether he
13 can state another claim based on the alleged denial of care for his HIV; however, Plaintiff will
14 need to include additional facts to state any claim for relief.

15 In addition, while Plaintiff mentions discrimination, he does not specifically allege how
16 he was discriminated against. Nor does he connect any alleged discrimination to a specific
17 defendant.

18 Plaintiff should be given leave to amend to attempt to assert a plausible claim for relief.

19 **III. RECOMMENDATION**

20 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

21 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to
22 maintain this action without prepaying the filing fee or giving security therefor. This
23

1 order granting IFP status does not extend to the issuance of subpoenas at government
2 expense.

3 (2) The complaint (ECF No. 1-1) should be **FILED**.

4 (3) The action should be **DISMISSED** for failing to state a claim upon which relief may
5 be granted; however, Plaintiff should be given **LEAVE TO AMEND** to attempt to assert
6 a plausible claim for relief.

7 (4) Plaintiff should be given **30 DAYS** from the date of any order adopting this Report
8 and Recommendation to file an amended complaint correcting the deficiencies noted
9 above. The amended complaint must be complete in and of itself without referring or
10 incorporating by reference any previous complaint. Any allegations, parties, or requests
11 for relief from a prior complaint that are not carried forwarded in the amended complaint
12 will no longer be before the court. Plaintiff shall clearly title the amended pleading as
13 “AMENDED COMPLAINT.” If Plaintiff fails to file an amended complaint within the
14 30 days, the action may be dismissed.

15 The Plaintiff should be aware of the following:

16 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
17 this Report and Recommendation within fourteen days of being served with a copy of the Report
18 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
19 Report and Recommendation” and should be accompanied by points and authorities for
20 consideration by the district judge.

1 2. That this Report and Recommendation is not an appealable order and that any notice of
2 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
3 until entry of judgment by the district court.

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5 Dated: August 25, 2020

6 William G. Cobb
7 William G. Cobb
United States Magistrate Judge

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